United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

B p/s

74-1380

To be argued by
Kenneth S. Birnbaum

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

Docket No. 74-1380

RODNEY RICHARD HILL,

Defendant-Appellant.

On Appeal From The United States District Court
For The Eastern District of New York

BRIEF FOR APPELLANT

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Edward N. Leavy
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Of Counsel

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STATEMENT OF THE CASE

This appeal arises from a conviction of appellant, after trial, for his failure to report for an armed forces physical examination, under 50 U.S.C. App. § 462(a), 32 C.F.R.§1628.16, and for knowingly failing to report for induction, under 50 U.S.C. App. §462(a), 32 C.F.R. §1632.14.

Mr. Hill registered with his local Selective Service Board in 1964. Between that time and December, 1970, appellant was granted educational and job deferments.

In January, 1970, appellant was classified I-A. In February, 1970, he was sent an order to report for a pre-induction examination; he failed to report for this examination. On March 30, 1970, he appeared in person at his local board and requested a deferment on the ground that he contributed to the support of his child. This request was later apparently denied.

On April 17, 1970, the local board directed the appellant to comply with the outstanding order to report for a pre-induction physical examination on May 7, 1970. The appellant did not report. He was then classified I-A and informed of his appeal rights. The local board rescheduled his pre-induction physical examination for June 4, 1970.

However, the defendant sent his local board a letter dated May 22, 1970, informing it that he failed to report for his May 7th physical because of illness.

After receiving this letter, his local board rescheduled his pre-induction physical examination for August 22, 1970. Mr. Hill failed to report for this examination.

On October 16, 1970, the appellant was ordered to report for induction on November 2, 1970. He again failed to report. He did appear personally on August 3, 1971 to fill out a Current Information Questionnaire. In the interim, he was reported to the United States Attorney for investigation and consideration toward prosecution. After Mr. Hill reported to his local board in August, however, the United States Attorney declined prosecution with a view toward providing Mr. Hill with a new date for induction.

The appellant was advised of his continuing duty and on February 17, 1972, he was directed to report for induction in compliance with the order of October 16, 1970. He did not report.

Mr. Hill was indicted for Selective Service offenses on May 24, 1973. On June 25, 1973, the appellant reported for induction after the government agreed to suspend its prosecution if he would report. At his induction examination, Mr. Hill was found "mentally disqualified", after scoring very poorly on the written portion of the examination, and was not permitted to continue the induction procedure.

The normal practice for handling those with such low scores is exclusion from draft eligibility for poor mental

performance, retesting or administrative acceptance. The latter category is reserved for those whom an army psychologist or psychiatrist believes failed the test intentionally.

Following the disqualification, the government initiated its prosecution on the previously suspended indictments.

QUESTION TO WHICH THIS BRIEF IS ADDRESSED

This brief on appeal is addressed to the following question:

> Was the institution of this prosecution after appellant was singled out for exceptional treatment at his induction a denial of due process of law?

SUMMARY OF ARGUMENT

I. THE SELECTIVE SERVICE SYSTEM TREATED APPELLANT IN AN UNREASONABLE, ARBITRARY AND CAPRICIOUS MANNER AT HIS INDUCTION EXAMINATION; THE PROSECUTION THAT RESULTED IS THEREFORE INVALID.

II. APPELLANT SHOULD HAVE EITHER BEEN GIVEN A RETEST ON THE WRITTEN EXAMINATION OR HAVE BEEN ADMINISTRATIVELY ACCEPTED.

ARGUMENT

POINT I

THE SELECTIVE SERVICE SYSTEM TREATED APPELLANT IN AN UNREASONABLE, ARBITRARY AND CAPRICIOUS MANNER AT HIS INDUCTION EXAMINATION; THE PROSECUTION THAT RESULTED IS THEREFORE INVALID.

Once the government decided to have Mr. Hill go through the normal induction process, it was obligated to treat him as it would treat any other inductee. This the government did not do. The failure of the government to provide him with this equal treatment resulted in Mr. Hill becoming the subject of the action which is herein appealed. Since the procedure employed in the processing of the appellant for military service was invalid, the prosecution which was initiated as a direct result of that procedure is also invalid.

Sgt. Pompa of the Fort Hamilton Examination Station, where the appellant took his induction examination, stated in his direct testimony (transcript P. 92) that, at the time of Mr. Hill's examination, the army psychologist or psychiatrist would administratively accept a man if he believed the man intentionally failed the written examination. Yet, in this case, in which the opinion below strongly suggests at P.9 that the appellant did intentionally fail the written examination - although no evidence was produced at the trial regarding this question - the doctor declared the appellant "Mentally Disqualified" (see report of Medical Examination,

Defendant's Exhibit A) rather than administratively accepted.

An immediate consequence of this disqualification was that Mr. Hill was not given a physical examination. Another and more important result was that the prosecution of the appellant, which had not gone forward as a result of his decision to be inducted, was instituted. It was never determined at the trial below whether the "Mentally Disqualified" classification resulted from a lack of motivation on the part of the defendant, or whether it stemmed directly from his low test score. If the reason was related to motivation, then Mr. Hill was singled out for treatment which differed from that accorded to all other inductees, since he was not administratively given a passing mark as - according to the testimony of Sgt. Pompa - were all other inductees whom the doctor believed failed the test intentionally.

Treating him in the normal manner would have meant that he would have been administratively accepted and been given a physical examination. In fact, the record is unclear whether all inductees should be given a physical regardless of the results of their written test. In any event, no physical examination was given. After the physical, the appellant would have either been rejected by the military (resulting in no military service and no prosecution) or accepted (resulting in military service and no prosecution). Classifying him as "Mentally Disqualified" precluded either of these possibilities.

There has been a long - long standing application of the guarantee of due process embodied in the 5th amendment to the United States Constitution which required that the action of the federal government not be unreasonable, arbitrary or capricious. It is therefore patently a violation of due process for the federal government to treat a potential inductee who is under indictment for a Selective Service violation in a unique and arbitrary manner, if there is no overriding reason for such such special procedures, and treating him in the routine fashion would enable him to avoid prosecution. Surely the doctrines of due process and equal protection require that the practices employed in this case not be allowed to prevail.

If the court here affirms the procedures employed, would it not also be allowing the military to treat a soldier who had been under indictment when inducted in a unique manner during his course of service, merely because it was gratuitous in allowing him to be inducted? May the standards for disciplining such a soldier during his course of service be different, as were the criteria used in declaring Mr. Hill mentally disqualified? If, as the opinion states "...the offenses here charged were complete as of the date of the indictment and anything that occurred subsequently is entirely irrelevant..." (opinion below, p.9, paragraph 2) a person who successfully completes his military service conceivably also could be tried for a Selective Service offense that existed

at the time of his induction. While the opinion does go on to state that the policy of the government is to dismiss Selective Service indictments if the person involved is inducted or rejected for a condition that pre-dated the indictment, there is no statement mandating the dismissal. The rights provided by that policy would become particularly fragile if the court affirms the decision in this case, since here an unreasonable exception taken to the normal procedure for administratively accepting individuals who fail the written test became a bar to determining whether the potential inductee had such a pre-existing disqualifying condition.

Moreover, while the opinion below cites a number of cases which have served to develop the proposition that post-indictment events are irrelevant, none of these cases concerned a defendant who was first allowed to go through the induction process, but then was prevented from completing it by an affirmative act of the government. The defendant in United States v. Borkenhagen, 468 F2d 43 (7th Cir. 1972), cert, denied 409 U.S.1021 (1972) refused of his own free will to take the symbolic step forward after he was allowed to go through with the induction process. In United States v. Greene, 456 F2d 256 (9th Cir. 1972), cert. denied 406 U.S. 977 (1972), the defendant did ask for an opportunity to be inducted, but the government denied him this opportunity; the denial was consistent with Justice Department policy, However, if he had

been permitted to go through the induction process, surely the government would have been obligated to have treated him in the same manner in which all other inductees were treated. The events in United States v. Weissman, 434 F2d 175 (8th Cir., 1970), cert. denied 401 U.S. 982 (1972) had to do with the burning of a draft card by the defendant, and the rejection by the court of the defendant's claim that his subsequent request for a new card cured the original offense. The doctrine which holds that events occurring after the offense are irrelevant as applied in the Weissman Case is hardly applicable in the instant case. The offense was complete when the card was burned: getting a new one had no effect on that fact. But if Mr. Hill were permitted to take his examination and be inducted, this would have overcome his previous failure to report for a physical examination and to be inducted. The court in United States v. Battaglia, 410 F2d 279 (7th Cir. 1969), cert denied 396 U.S. 848 (1970), noted at p.282 that a defendant is often given the option of submitting to induction or facing prosecution, but "(W)e usually find it applied when the violation charged is having refused to submit to an order to report for induction itself. By contrast the instant case is concerned with false representation or the refusal to give information."

Not only did the cases that established this proposition not contemplate facts which are similar to those presented here,

but it would certainly be unjust to use the rule to excuse a gross irregularity in the induction process which directly results in the in the prosecution of a potential inductee.

POINT II

APPELLANT SHOULD HAVE EITHER BEEN GIVEN A RE-TEST ON THE WRITTEN EXAMINATION OR BEEN ADMINISTRATIVELY ACCEPTED.

The appellant further argues that not allowing him to take another written examination, regardless of the reason for his failure of the first one, was also a violation of the guarantee of due process. While there is no clear evidence on the record, the reason for the appellant's disqualification may simply have been his low test score, without any reference to his motivation. Judicial notice can be taken of the fact that many people who have ever taken a written test have had a "bad day." The poor score may be caused by a physical ailment, a lapse of memory or a variety of other physical or psychological irregularities. Certainly, the appellant was under a mental strain at the time of the test, since he was aware that he had recently been indicted. Sgt. Pompa, who has been involved in written examinations of prospective inductees for three years, testified that it is an every day occurence for normally acceptable individuals to have bad days and fail the written test. In such cases, according to his testimony, the Selective Service System may order a re-test (transcript, p. 92).

Normally, not allowing an inductee the opportunity for a re-test would not be violative of due process, since the opportunity to be drafted is not a protected right. In the

appellant's case, however, the refusal of the military to allow a re-test clearly meant that he would be prosecuted. If Mr. Hill failed the test honestly, then he was not eligible for induction because of a disability which existed prior to the date of his indictment. If he had a "bad day" then he was not treated equally, since all other inductees who had "bad days" were given re-tests to determine whether they should be permitted to continue with their induction procedure.

If the Selective Service System decided that one of these two alternatives was actually the case, then due process would have required that a re-test be given to provide the appellant with an opportunity to avoid the prosecution which inevitably followed. And, as mentioned previously, if the System thought that he failed the test intentionally, then the doctrine would have mandated his administrative acceptance and his allowance to continue the induction process.

No evidence was presented at the trial to indicate that any effort was made by the doctor who ruled Mr. Hill unqualified to determine whether the test result was legitimate, or an aberration, or whether it was failed intentionally. Considering the extremely low score and the consequences of disqualifying the appellant, such an effort should clearly have been made.

While none of the above alternatives was chosen, the government continued its prosecution. In so doing, it placed

Mr. Hill in an anomalous and unfair position. He attempted to comply with the induction order, but was barred from completing the examination by the military. Nonetheless, the government has not dismissed the indictment.

CONCLUSION

Defendant respectfully requests an acquittal. The record establishes that the appellant tried to go through with his induction, but the government affirmatively prevented a determination of his qualifications for induction from being made. Its failure both to determine fairly whether Mr. Hill was qualified or to recommend dismissal of the indictment once his induction was prevented, was clearly unreasonable, arbitrary and capricious.

Dated: New York, New York
April 19, 1974

Respectfully submitted,

LEAVY, SHAW & HORNE
Attorneys for Appellant
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New York, New York 10007

Edward N. Leavy
Kenneth S. Birnbaum
Of Counsel

Index No. Year 19

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NEW YORK, N. Y. 10007

233-8991

To

Attorney(s) for

Service of a copy of the within is hereby admitted.

Dated,

.....

Sir:— Please take notice

NOTICE OF ENTRY

that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 19

NOTICE OF SETTLEMENT

that an order of which the within is a true copy will be presented for settlement to the HON.

one of the judges of the within named Court,

at

on the day of 19 at M.

Dated,

Yours, etc.

LEAVY & SHAW

Attorneys for

Office and Post Office Address

233 Broadway—Suite 4901

NEW YORK, N. Y. 10007

To

Attorney(s) for

STATE OF NEW YORK. COUNTY OF

CERTIFICATION BY ATTORNEY

The undersigned, an attorney admitted to practice in the courts of New York State, certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

Dated: .....

STATE OF NEW YORK, COUNTY OF

ATTORNEY'S AFFIRMATION

The undersigned, an attorney admitted to practice in the courts of New York State, shows: that deponent is the attorney(s) of record for in the within action; that deponent has read the foregoing and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. Deponent further says that the reason this verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated: .....

STATE OF NEW YORK, COUNTY OF ss.:

INDIVIDUAL VERIFICATION

, being duly sworn, deposes and says that deponent is the in the within action; that deponent has read the foregoing and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.

Sworn to before me, this day of 19 .....

STATE OF NEW YORK, COUNTY OF ss.: **CORPORATE VERIFICATION**

, being duly sworn, deposes and says that deponent is the of the corporation named in the within action; that deponent has read the foregoing and knows the contents thereof; and that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true.

This verification is made by deponent because is a corporation. Deponent is an officer thereof, to-wit, its

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me, this day of 19 .....

STATE OF NEW YORK, COUNTY OF ss.: **AFFIDAVIT OF SERVICE BY MAIL**

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the day of 19 deponent served the within upon attorney(s) for in this action, at the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States post office department within the State of New York.

Sworn to before me, this day of 19 .....

STATE OF NEW YORK, COUNTY OF ss.: **AFFIDAVIT OF PERSONAL SERVICE**

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the day of 19 at No. deponent served the within upon the herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me, this day of 19 .....

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-against-

RODNEY RICHARD HILL,

Defendant-Appellant.

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AFFIDAVIT OF SERVICE
BY MAIL

Docket #74-1380

STATE OF NEW YORK)
ss,:
COUNTY OF NEW YORK)

KENNETH BIRNBAUM being duly sworn, deposes and says that deponent is not a party to this action, is over 18 years of age and resides at 233 Broadway, New York, New York 10007. That on the 22nd day of April, 1974 deponent served the within brief and appendix upon the United States Attorney's Office for the Eastern District of New York, Attorneys for Appellee, Cadman Plaza, Brooklyn, New York the address designated by said attorneys for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States post office department within the State of New York.

Kenneth S. Birnbaum

Sworn to before me this
22nd Day of April, 1974.

Edward N. Lean

EDWARD N. LEAN
Notary Public, State of New York
No. 31-2155926
Qualified in New York County
Commission Expires March 30, 1975